

STATE OF MICHIGAN
COURT OF APPEALS

CHRISTOPHER J. ZIRKLE,

Plaintiff-Appellee,

v

JACKIE M. FRANKLIN, n/k/a JACKIE M.
VOIGHT,

Defendant-Appellant.

UNPUBLISHED

September 16, 2008

No. 282826

Wayne Circuit Court

LC No. 07-701692-DC

Before: Wilder, P.J., and Markey and Talbot, JJ.

PER CURIAM.

Defendant appeals by leave granted the order of the trial court denying her motion to dismiss for lack of subject matter jurisdiction. We affirm.

On appeal, defendant argues that the trial court lacked subject matter jurisdiction because the Texas court in which she had filed a complaint for child custody had “home state jurisdiction” under the Uniform Child-Custody Jurisdiction and Enforcement Act (“UCCJEA”), codified in Michigan as MCL 722.1101 *et seq.* Alternatively, she argues that this Court should vacate the trial court’s order and remand for the trial court to provide defendant a record of its communication with the Texas court, offer the parties an opportunity to present facts and legal arguments before a decision on jurisdiction is made, and make findings of fact regarding whether plaintiff’s removal of the parties’ child from Texas constituted “unjustifiable conduct.”

The parties have one child together, Aura Faye Zirkle, who was born in Texas on April 20, 2006. The parties were never married to one another. Both parties signed a State of Texas Acknowledgement of Paternity the day after the child’s birth. The parties and the child lived together in Texas until November 2006, when plaintiff moved to Michigan with the child. Plaintiff commenced these child custody proceedings in the Wayne Circuit Court (“the trial court” or “the court”) on January 18, 2007. In August 2007, plaintiff returned the child to Texas, at defendant’s request, because defendant wanted the child with her to attend a funeral. When defendant failed to bring the minor child back, plaintiff filed a motion asking the trial court to intervene and order defendant to return the child to Michigan. After defendant failed to appear for several hearings in the trial court and did not return the child to Michigan, the trial court entered an order finding defendant in contempt of court. On November 13, 2007, defendant filed a motion to dismiss, arguing that the trial court lacked jurisdiction under the UCCJEA to make a child custody determination. Shortly thereafter, on November 27, 2007, defendant filed an

action in the 306th Judicial District Court of Galveston County, Texas (“the Texas court”) seeking an award of custody. According to the trial court’s order, the trial judge spoke to Judge Stephen Baker of the Texas court by telephone on December 4, 2007. The only record of this communication is a letter dated January 7, 2008, authored by Judge Brennan of the Wayne County Circuit Court, which implied the Texas court acquiesced to the Michigan court continuing to exercise jurisdiction in this matter “[i]n light of the lengthy proceedings that have taken place in Michigan over the past eleven months and considering the provisions of the UCCJEA and the best interests of the minor child.” The trial court entered an order denying defendant’s motion to dismiss on December 11, 2007.

“Whether a trial court has subject-matter jurisdiction presents a question of law that this Court reviews de novo.” *Atchison v Atchison*, 256 Mich App 531, 534; 664 NW2d 249 (2003). “Once jurisdiction is established, a trial court’s decision concerning whether to exercise jurisdiction in a custody proceeding is reviewed for an abuse of discretion.” *Fisher v Belcher*, 269 Mich App 247, 253; 713 NW2d 6 (2005). The jurisdictional determination in this case involves the UCCJEA. “Issues of statutory construction present questions of law that are reviewed de novo.” *Atchison*, *supra* at 534-535.

Defendant argues that, because Texas had “home state jurisdiction” under Michigan’s version of the UCCJEA, the trial court lacked jurisdiction and, therefore, erred in denying her motion to dismiss. MCL 722.1201 sets forth the basic jurisdictional requirement for making an initial custody determination:

(1) Except as otherwise provided in section 204,¹ a court of this state has jurisdiction to make an initial child-custody determination only in the following situations:

(a) This state is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within 6 months before the commencement of the proceeding and the child is absent from this state but a parent or person acting as a parent continues to live in this state.

(b) A court of another state does not have jurisdiction under subdivision (a), or a court of the home state of the child has declined to exercise jurisdiction on the ground that this state is the more appropriate forum under section 207 or 208, and the court finds both of the following:

¹ MCL 722.1204 provides for temporary emergency jurisdiction in a court of this state “if the child is present in this state and the child has been abandoned or it is necessary in an emergency to protect the child because the child, or a sibling or parent of the child, is subjected to or threatened with mistreatment or abuse.” This provision is not relevant here because plaintiff made no such allegation in his complaint.

(i) The child and the child's parents, or the child and at least 1 parent or a person acting as a parent, have a significant connection with this state other than mere physical presence.

(ii) Substantial evidence is available in this state concerning the child's care, protection, training, and personal relationships.

(c) All courts having jurisdiction under subdivision (a) or (b) have declined to exercise jurisdiction on the grounds that a court of this state is the more appropriate forum to determine the custody of the child under section 207 or 208.

(d) No court of another state would have jurisdiction under subdivision (a), (b), or (c).

(2) Subsection (1) is the exclusive jurisdictional basis for making a child-custody determination by a court of this state.

(3) Physical presence of, or personal jurisdiction over, a party or a child is neither necessary nor sufficient to make a child-custody determination. [Footnote added.]

The term "home state" is defined in MCL 722.1102(g) as:

[T]he state in which a child lived with a parent or a person acting as a parent for at least 6 consecutive months immediately before the commencement of a child-custody proceeding. In the case of a child less than 6 months of age, the term means the state in which the child lived from birth with a parent or person acting as a parent. A period of temporary absence of a parent or person acting as a parent is included as part of the period.

The trial court assumed jurisdiction based on its determination that neither Michigan nor Texas qualified as the child's "home state," impliedly based on its interpretation of MCL 722.1102(g), finding that "in the six consecutive months immediately before the commencement of this proceeding on January 18, 2007, Aura lived with a parent in two different states." The trial court then asserted jurisdiction, determining that the child and plaintiff had a "significant connection with this state other than mere physical presence" and that "substantial evidence" existed in Michigan pertaining to "the child's care, protection, training, and personal relationship." MCL 722.1201(1)(b)(i) and (ii).

Although the trial court was correct in finding that Michigan was not the "home state" for the child pursuant to MCL 722.1201(1)(a), its determination that Texas also did not qualify as a "home state" was in error. Specifically, although the minor child did not reside in Texas during "the six consecutive months *immediately* before the commencement of [the] proceeding," MCL

722.1102(g) (emphasis added), this did not preclude Texas from being deemed the child's "home state" for purposes of jurisdiction under the UCCJEA. MCL 722.1201(1)(b) permits Michigan to assume jurisdiction "only" if "A court of another state does not have jurisdiction under subdivision (a)."² MCL 722.1201(1)(a) provides, alternatively:

This state is the home state of the child on the date of the commencement of the proceeding, *or* was the home state of the child *within* 6 months before the commencement of the proceeding and the child is absent from this state but a parent or person acting as a parent continues to live in this state. [Emphasis added.]

Clearly, the minor child resided in Texas with both parents from her birth until plaintiff removed the child to Michigan in November 2006. MCL 722.1201(2) provides that "Subsection (1) is the exclusive jurisdictional basis for making a child custody determination by a court of this state." Because plaintiff initiated custody proceedings on January 8, 2007, within the six-month criteria elucidated in MCL 722.1201(1)(a), jurisdiction was proper in Texas and the trial court should not have proceeded with a custody determination.

Approximately 11 months after the initiation of proceedings in Michigan, the Texas court declined to exercise jurisdiction in this matter. The letter memorializing contact with the trial court suggests that the Texas court's agreement to decline to exercise its jurisdiction was based on "the lengthy proceedings that have taken place in Michigan" and not on a determination that it originally lacked jurisdiction. It is worth noting that defendant did not challenge the trial court's subject matter jurisdiction when proceedings initiated. In fact, defendant retained a Michigan attorney and the parties, or their respective legal counsel, appeared in the trial court and even agreed to and participated in mediation. It was not until mid-November 2007 that defendant challenged jurisdiction in the trial court and shortly thereafter, filed her own action in Texas to secure custody of the minor child. It was at this juncture that the Michigan and Texas courts communicated on the issue of jurisdiction.

The subsequent decision by the Texas court to decline to assert jurisdiction, coupled with the amount of time that had passed, serves to remedy the trial court's initial, erroneous assumption of jurisdiction pursuant to MCL 722.1201(1)(b). As noted by the trial court, we are confronted now by the extended period of time that has elapsed in this matter and its impact on the "best interests of the child." While we are concerned regarding the initial errors by the trial court in asserting jurisdiction, to vacate and remand this matter at this stage would serve no useful purpose and only delay further proceedings, as implicitly recognized by the Texas court when it declined to exercise jurisdiction.

Defendant further asserts error by the trial court regarding violation of MCL 722.1110, which provides, in relevant part:

² See also MCL 722.1201(1)(d), which provides: "No court of another state would have jurisdiction under subdivision (a), (b), or (c)."

(1) A court of this state may communicate with a court in another state concerning a proceeding arising under this act.

(2) The court may allow the parties to participate in the communication. If the parties are not able to participate in the communication, the parties shall be given the opportunity to present facts and legal arguments before a decision on jurisdiction is made.

The statute is clearly discretionary regarding the initiation of communication between the courts and the participation by the parties in any such communication. MCL 722.1110(2) is not applicable, because the parties are only required to have an “opportunity to present facts and legal arguments *before* a decision on jurisdiction is made.” (Emphasis added.) This communication occurred fairly belatedly in the proceedings, after the trial court had already made a determination, albeit erroneous, regarding its authority to exercise jurisdiction. In addition, defendant fails to assert or demonstrate that she was “not able to participate in the communication,” MCL 722.1110(2), or that the trial court violated MCL 722.1110(4) by failing to inform the parties of the court’s communication with Texas or grant access to the record. Defendant had retained counsel in Michigan and filed a motion asserting lack of jurisdiction, which did not seek, as part of the relief requested, communication with the Texas court regarding the propriety of that forum’s jurisdiction. Arguably, the filing and hearing on defendant’s motion asserting lack of jurisdiction provided “the opportunity to present facts and legal arguments” before the trial court reasserted its determination regarding jurisdiction. Further, defendant fails to demonstrate, even if the statutory provision had been violated, any remedy required by the statute for this Court to impose.

Defendant also contends the trial court erred in failing to decline jurisdiction based on her assertion that plaintiff engaged in “unjustifiable conduct” by removing the minor child to Michigan from Texas. MCL 722.1208(1). Defendant misconstrues the statutory language. MCL 722.1208 provides, in pertinent part:

(1) [I]f a court of this state has jurisdiction under this act because a person invoking the court’s jurisdiction has engaged in unjustifiable conduct, the court *shall decline* to exercise its jurisdiction *unless* the court finds 1 or more of the following:

(a) The parents and all persons acting as parents have acquiesced in the exercise of jurisdiction.

(b) A court of the state otherwise having jurisdiction under sections 201 to 203 determines that this state is a more appropriate forum under section 207.

(c) No court of another state would have jurisdiction under sections 201 to 203.

(2) If a court of this state declines to exercise its jurisdiction under subsection (1), the court may fashion an appropriate remedy to ensure the safety of the child and prevent a repetition of the unjustifiable conduct, including staying

the proceeding until a child-custody proceeding is commenced in a court having jurisdiction under sections 201 to 203. [Emphasis added, footnotes omitted.]

Clearly, MCL 722.1208(1) does not strictly mandate the trial court to decline jurisdiction based on the alleged “unjustifiable conduct” of the plaintiff. Rather, the exception contained in MCL 722.1208(1)(c), premised on the Texas court’s decision to decline jurisdiction, permits the trial court to continue with proceedings in this matter. We do not, by this Order, intend to justify the errors, which resulted in the trial court’s exercise of jurisdiction. However, given the protracted nature of this litigation, to “start over” would merely create further delays in obtaining a resolution, which we determine not to be in the child’s, or parties’, best interests.

Affirmed.

/s/ Kurtis T. Wilder

/s/ Michael J. Talbot